To be argued by

WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 148.

THE UNITED STATES OF AMERICA
ex rel. NICOLAI MENSEVICH,
Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York,
Respondent.

BRIEF FOR APPELLANT.

Statement of Facts.

This is a direct appeal to this Court from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus (Record, p. 87). It presents the point that the direction of the Secretary of Labor to deport the relator to Poland as the "country whence he came," when it is indisputable that Po-

land is *not* the country whence he came, is unauthorized and arbitrary, and deprives the relator of liberty without due process of law.

The constitutional question was duly raised by the petition for habeas corpus (Record, p. 4) and the traverse to the return (Record, pp. 84-85).

A departmental warrant for Mensevich's deportation (Record, p. 10) was issued on September 30, 1921. This warrant was based on hearings held September 7th and 12th, 1921 (Record, pp. 56-67). After issuance of the warrant the Secretary of Labor directed a rehearing at which the former evidence was repeated and additional evidence introduced (Record, pp. 11-56). The record discloses flagrant violations of constitutional rights. The additional evidence upon rehearing, however, which is not here open to attack for falsity, makes a case for deportation independent of the case based upon violations of constitutional rights. We do not, therefore, press the claim that Mensevich is not legally subject to deportation.

We stand solely upon the point that the order for his deportation to Poland, as "the country whence he came," is an arbitrary and unconstitutional excess of power.

The warrant of deportation (Record, p. 10) commands the Commissioner of Immigration

> "to return the said alien to Poland, the country whence he came."

Mensevich, a man of Russian race and parentage who has repeatedly affirmed his Russian citizenship, was born on May 2, 1896, in the village of Tychny or Cichaniny, province of Grodno, Russia

(Record, pp. 11, 12, 14, 56, 57). He came to the United States as a Russian, with a Russian passport, in 1911 (Record, pp. 14, 57), and has remained in the United States without interruption.

Of what country the province of Grodno is now part, and of what country its emigrant natives are citizens—these are manifestly questions of international law, not of individual opinion. Mensevich's conclusion that Grodno is now part of Poland (Record, pp. 12, 56) rests obviously upon misconstruction of the legal effect of the recent Polish military occupation of the province of Grodno. At the first hearing he appears to have indulged the further inference that the Polish occupation of Grodno had divested his Russian citizenship (Record, p. 57). On rehearing he asserted his claim of Russian citizenship (Record, p. 12). The inspector, however, reported to the Department of Labor the finding that Mensevich is a "citizen of Poland, of Russian race" (Record, p. 54); and the Department of Labor, after review of the record on rehearing, directed Mensevich's deportation under the outstanding warrant which had issued following the original hearing (Record, p. 8), and which directs his deportation to Poland as the "country whence he came" (Record, p. 10).

The substantive facts are undisputed, viz., that Mensevich came from Grodno and entered as a Russian in 1911, and has since remained continuously in the United States, and that Grodno, though under Polish occupation, has not been recognized as part of Poland. The latter is a fact of such character that it will be judicially noticed by any court at any stage of any pro-

ceeding. As the facts are undisputed, the finding that Poland is the country whence Mensevich came can rest only upon Mensevich's erroneous conclusions as to the legal effect of the Polish occupation of Grodno. These erroneous conclusions are of no significance whatever in determining of what country Grodno is, in law, a part, and of what country natives of Grodno who emigrated as Russians are now citizens. They should have been disregarded.

Grodno was indubitably recognized by our government as part of Russia when Mensevich left it for the United States. It had been so recognized for over a century. Its status as part of Russia continues until the political departments of our government take some inconsistent action. The political departments have taken no inconsistent action. On the contrary, they have made it clear that this government carefully abstains from recognizing Grodno as part of Poland.

The rulings of the executive branch of our government establish conclusively, and to the exclusion of all attempts to maintain in law or fact a contrary hypothesis, that Grodno cannot in an American court be deemed part of Poland. Two branches of the executive—the Department of Labor and the Department of State—have ruled on the point.

The Department of Labor has ruled that natives of the Polish Occupation Territory, which includes Grodno, may not be included within the Polish immigration quota. The Commissioner General of Immigration answered as follows an inquiry from Mensevich's attorneys (Record, p. 83):

"U. S. Department of Labor,
Bureau of Immigration,
Washington.

Address reply to Commissioner General of Immigration and refer to No.....

June 28, 1922.

Messrs. Hale, Nelles and Shorr,
80 East 11th St.,
New York, N. Y.

Sirs:

In reply to your letter the Bureau has to advise that natives of the region designated as the 'Polish Occupation Territory' are not included within the Polish quota, but commencing with July 1 will be included within a quota allotted to what will be termed the 'Pinsk Region.'

Respectfully,

I. F. WIXON,
Assistant Commissioner General.

MAC/CS."

The Secretary of State answered as follows an inquiry from the United States Attorney with relation to this case (Record, p. 84; see also his letter to Messrs. McElroy & Reid, p. 83):

"Department of State,
Washington.

July 11, 1922.

Mr. William Hayward,
United States Attorney,
New York City.

Sir:

Reference is made to your letter of June 30, 1922, addressed to the Attorney General, relating to the deportation of Nicholai Mensevich, and requesting certain information concerning the political status of the town of Tychny or Cichaniny. A copy of your letter has been referred to this Department, for its consideration.

In reply you are informed that the towns of Tychny and Cichaniny appear to be the same. The Government of the United States has recognized Poland as a sovereign state. This action, however, did not involve the recognition of her territorial boundaries. Without undertaking to pass upon the status of the territory east of the Curzon Line, in which this town lies, you are informed that this Department understands that this territory is now under Polish administration. I am, Sir,

Your obedient servant,

CHARLES E. HUGHES."

SPECIFICATION OF ERROR.

(Assignment of Errors, Record, pp. 88, 89.)

The District Court erred in not holding that the order for Mensevich's deportation to Poland was arbitrary and unauthorized by law, and deprived

him of life, liberty, and property without due process of law.

ARGUMENT.

I.

The rulings of the Department of State and Labor conclusively establish that the province of Grodno is not part of Poland.

That Grodno is not part of Poland, and consequently that Poland is not the country whence Mensevich came, is conclusively fixed and determined by the rulings of the political branch of the government. Questions of extent of territorial sovereignty are not open to trial or adjudication upon evidence. What any individual says or thinks about them is immaterial. The position taken by the executive branch, in the absence of inconsistent action by the legislative branch, is conclusive, and the Courts will take judicial notice and conform to it regardless of what may have been alleged or proved.

Jones v. *United States,* 137 U. S. 202.
Williams v. *Suffolk Insurance Co.,* 13 Pet. 415.
Oetjen v. *Central Leather Co.,* 246 U. S. 297, 302.
In re Cooper, 143 U. S. 472, 503.
Gelston v. *Hoyt,* 3 Wheat. 246, 324.

In *Jones* v. *United States, supra*, the Court said at page 212:

> "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."

The Court quoted as follows from *Williams* v. *Suffolk Insurance Co., supra* (13 Pet. at 420):

> "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question.

The Court said further at page 214:

> "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

In *Pearcy* v. *Stranahan*, 205 U. S. 257, 273-274, in a situation where the political departments of the government had expressly reserved for future

action the determination of the *de jure* status of the Isle of Pines, Mr. Chief Justice White and Mr. Justice Holmes, though concurring in the decision that the island remains a foreign country while not occupied by the United States, deemed it material to protest against any intimations in the majority opinion with respect to its *de jure* status

Recognition of territorial boundaries of Russia, including the province of Grodno, is implied in our diplomatic relations with Russia for a period of over a century. The status of Grodno as part of Russia will continue until some inconsistent action is taken by the political branch of our government. As Mr. Justice Story said in *Gelston* v. *Hoyt*, 3 Wheat. 211, 224:

> "No doctrine is better established, than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

The position taken by the political departments upon questions of territorial sovereignty will be judicially noticed and given effect by any court at any stage of a pending proceeding, irrespective of the record. In *Kennett* v. *Chambers*, 14 How. 38, 47, 48, a bill for specific performance of a contract made by a general of the Texan army with a view to financing operations against Mexico was dismissed on demurrer. The decision was based on the fact that the independence of Texas, though asserted by that State, had not then been recog-

nized by the United States. The Court established this by reference to the President's messages, a letter from him to the Governor of Tennessee, and a note from the Secretary of State to the Mexican minister. None of these were part of the record before the Court. In a recent English case, Mr. Justice Roche, taking judicial notice of the fact that the Soviet Government of Russia had not been recognized by his government, denied validity to a title derived from the Soviet Government (*Aksionairnoy Obsschestvo, etc.* v. *Sagor,* L. R. 1921, 1 K. B. 456). The Court of Appeal, holding this decision correct as of the time it was made, took judicial notice of the subsequent recognition of the Soviet Government as a *de facto* sovereignty and reversed the decision (L. R. 1921, 3 K. B. 532).

From these authorities it is clear that if positions were reversed and the relator were affirmatively asserting, instead of denying, that, in view of the Polish occupation of Grodno, Poland is the country whence he came, it would be the duty of this Court to disregard his assertion and give effect to the position taken by the political branch of the government with respect to the status of the Province of Grodno. He could not be suffered to put the United States to any extent whatever in the position of recognizing a territorial sovereignty as to which its actual attitude is one of painstakingly reserved decision. Neither can the inconsiderate action of officials of the Department of Labor in this particular case, obviously taken without regard to its implications or intention to reverse the carefully considered position of the political department of our government.

The State Department's "understanding" that Grodno is now under Polish administration is

merely a statement of its knowledge of a fact. It is far from indicating a recognition of Polish sovereignty over that territory, either *de jure* or *de facto*. It might similarly say that it understands that Moscow is under the administration of the Soviet Government without implying the slightest degree of recognition of that government. As to the Province of Grodno, Poland must stand in our courts as the Republic of Costa Rica would have stood in *Jones* v. *United States, supra,* if at the moment of litigation the guano island which the political department of our government recognized as appertaining to the United States had been in fact under Costa Rican occupation and administration.

II.

The order of deportation to Poland was unauthorized and arbitrary, and inconsistent with due process of law.

The material language of Section 20 of the Immigration Act (Act of February 5, 1917, ch. 29; 39 Stat. 874), is as follows:

> "Sec. 20. That the deportation of aliens provided for in this act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which said alien embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or if such aliens entered foreign contiguous territory from the United States or if such aliens are held by the country from

> which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their re-entry, or imposes any condition upon permitting re-entry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States."

In this case there is no record or finding as to Mensevich's port of embarkation for the United States. There is no suggestion that he entered from foreign contiguous territory. The only option open to the Secretary of Labor, therefore, is to deport him to the country whence he came. He came from Tychny in the Province of Grodno. The rulings of the executive departments of State and Labor conclusively establish that Grodno is not part of Poland, and that Poland, therefore, is not the country whence he came. The Immigration Law makes no provision for the return of an alien to a particular town or province, and it is not the practice of the Department of Labor to deport aliens to the particular region whence they came. It has no appropriation with which to effect the relator's deportation to the Village of Tychny. And if it had a sufficient appropriation, it would have neither legal right so to expend it, nor physical power to see that he was transported across Poland and past the Curzon line. Deportation is complete when the alien is deposited at any convenient port of entry in his country of origin. The present state of national feeling in Poland is well known. To deposit at Warsaw an alien stranger under the stigma of deportation from the United States might cost him his life.

The situation is precisely the same as if the Secretary of Labor issued a warrant directing that a German native of the Ruhr territory be returned to "France, the country whence he came," and executed the warrant by depositing him at Bordeaux or Marseilles.

The order of the Department of Labor is worse than a mistake of law, such as was involved in *Gegiow* v. *Uhl*, 239 U. S. 3. It is a flat violation of law. No possible construction of the Immigration Act confers upon the Department of Labor authority or discretion to deport an alien to a hostile country to which he is wholly a stranger—a country in which, for all that appears, he has never set foot. The finding that Poland is the country whence he came is as arbitrary and as inconsistent with the fundamental principles of justice embraced within the conception of due process of law as a finding unsupported by evidence or without fair hearing.

> *American School of Magnetic Healing* v. *McAnulty*, 187 U. S. 94.
> *Chin Yow* v. *United States*, 208 U. S. 8.

Though the particular situation is of first impression, the principles applicable to it are not.

In *Lewis* v. *Frick*, 233 U. S. 291, this Court said, at pages 303-304:

> "His destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the Act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came'

> when he first entered the United States. See *Lavin* v. *Le Fevre*, 125 Fed. Rep. 693, 696; *Ex parte Wong You*, 176 Fed. Rep. 933, 940; *United States* v. *Ruiz*, 203 Fed. Rep. 441, 444. We need go no further, and may therefore leave undecided the question whether the Act leaves any room for discretion on the part of the Secretary of Commerce and Labor."

What the Court here left undecided was whether the statute empowered the Secretary of Labor in his discretion to construe "country whence he came" as meaning the country of latest entry (Canada in the particular case) as well as the country from which the alien departed for his original entry. By no possibility of construction can this case be deemed to intimate a doubt of the power and duty of the courts to prevent by habeas corpus the exercise by the Secretary of Labor of an arbitrary discretion to nominate as the country whence the alien came the country where there is no reason to believe that the alien ever in fact set foot.

In the lower federal courts the cases in which the conformity of the Secretary of Labor's directions as to destination with his statutory power has been examined are numerous. In most of them the question was whether the Secretary was obliged to deport Chinese to Canada or Mexico rather than to China, and the decisions, like that in *Lewis* v. *Frick*, *supra*, sustained his designation of the country of ultimate origin. But in all cases where the Department of Labor has attempted to exercise a discretion in the selection of destination clearly exceeding the power conferred upon him by the statute, habeas corpus has been sustained.

In *United States ex rel. Ruiz* v. *Redfern*, 186 Fed. 603, the relator (though of Spanish birth) was

naturalized and had his domicile in the Republic of Panama and came thence to the United States. The warrant for his deportation directed that he be returned to Spain. Habeas corpus was sustained. Though Spain was the country of his origin, it was clearly arbitrary to say that Spain was the "country whence he came." District Judge Foster said:

> "I do not find that the Secretary of Commerce and Labor has any discretion whatever in the matter, and any warrant that attempts to exercise such discretion is necessarily illegal and void."

And in affirming this decision the Circuit Court of Appeals for the Fifth Circuit (whose decision was cited by this Court in *Lewis* v. *Frick, supra*), said (203 Fed., at 444):

> "Detention under a warrant directing the relator's deportation to a country to which the government had no right to cause him to be deported is an illegal detention and restraint of his liberty against which a writ of habeas corpus is an available remedy."

In *Ex parte Gytl,* 210 Fed. 918, the relators were a group of Austrains domiciled in Canada, who had, in ignorance that they were crossing a frontier, taken employment with a farmer in North Dakota. The Department of Labor directed their deportation to Austria. The Court sustained a writ of habeas corpus upon the ground that Canada was clearly the only country from which it could fairly be held that they had come, saying:

> "The evidence presenting no controverted issue of fact, the determination of the country to which they should be deported is

> wholly a matter of law and the decision of that question by administrative officers is not binding upon the court."

The same principles were applied by the Circuit Court of Appeals for the Fifth Circuit in *Yee Suey* v. *Berkshire,* 232 Fed. 143; and by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Sisson,* 206 Fed. 450. The latter case involved an attempt to deport to China persons of Chinese race who had entered the United States from Canada, where they were domiciled. There was no evidence that they had ever been in China. The Court said:

> "It is said that the Canadian authorities will not accept these aliens, but with that we have nothing to do. * * * The country whence these aliens came is unquestionably Canada, and there is no provision of that act (the Immigration Act) which permits their deportation to China."

See, also:

Ung Bak Foon v. *Prentis,* 227 Fed. 406 (C. C. A., 7th Cir.).

Bun Chew v. *Connell,* 233 Fed. 320 (C. C. A., 9th Cir.).

Singh v. *United States,* 243 U. S. 557 (C. C. A., 9th Cir.).

Ex parte Matthews, 277 Fed. 857 (Western District of Washington).

Lee Ching v. *Collector of Customs,* 33 Philippines 329, 332.

There is no room to suppose that in the selection of destinations for deportation the Department of Labor has an arbitrary discretion which the involved, but painstakingly precise, language of the statute (pp. 11-12, *supra*) in nowise pretends to confer. And there can be no doubt upon either principle or authority that the attempt by the Department of Labor to assert and exercise such an arbitrary discretion violates the principles of due process of law and presents a situation where the Court, upon a direct appeal from the District Court, may insist upon the correct construction and application of the due process clause of the Fifth Amendment.

It is unnecessary upon this record to consider or pass upon the situation which might arise if the Province of Grodno should be recognized by this government as part of Poland—or to take another illustration, if the case were of a German-born immigrant from Alsace now ordered deported to France. That case, when it arises, will be by no means simple. The Courts may well hesitate to decide, or to hold that the Secretary of Labor has discretion to decide, that France is the country whence such an Alsatian came.

The case at bar is much stronger. The obvious fact of the situation is that Section 20 of the Immigration Act was framed without reference to the possibility of readjustment of national boundaries. The course of history has created situations which its provisions do not cover.

CONCLUSION.

The rulings of the Executive Departments of State and Labor conclusively determine that Poland is not the country whence Mensevich came. The attempt to deport him thither is arbitrary and unauthorized and violative of the principles of due process of law.

The order appealed from should be reversed and the writ of habeas corpus sustained.

Dated, November 19, 1923.

Respectfully submitted,

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